

COMMONWEALTH OF VIRGINIA
Department of Environmental Quality
Division of Water Quality
Larry G. Lawson, P.E., Director

Subject: Guidance Memorandum Number 04-2009
Guidance on Wetlands Created During Mining Operations

To: Regional Directors

From: Larry G. Lawson, P.E., Director



Date: February 24, 2004

Copies: Rick Weeks, Kathy Frahm, Deputy Regional Directors,
Regional VWPP Managers, Ellen Gilinsky

Summary:

This guidance is provided to the Virginia Water Protection Permit (VWPP) Program staff concerning the regulation of waterfilled depressions created in dry land during construction and excavation operations permitted by the Department of Mines, Minerals and Energy (DMME) as part of a surface mining operation. Per the VWPP regulations, and in accordance with similar federal guidance, such areas are not to be regulated under the VWPP program until the operation ceases and the site is abandoned.

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at <http://www.deq.state.va.us/water>.

Contact information:

Please contact Ellen Gilinsky, Director of the Office of Wetlands and Water Protection and Compliance, at 804-698-4375 with any questions about the application of this guidance.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

DEQ GUIDANCE ON REGULATION OF SURFACE WATERS CREATED DURING ACTIVE SURFACE MINING OPERATIONS UNDER THE VIRGINIA WATER PROTECTION PERMIT PROGRAM

Background

Section 62.1-44.15:5 D 5 of the Code of Virginia states in part that: ".....The Board shall utilize the U.S. Army Corps of Engineers' "Wetlands Delineation Manual, Technical Report Y-87-1, January 1987, Final Report" as the approved method for delineating wetlands. The Board shall adopt appropriate guidance and regulations to ensure consistency with the U.S. Army Corps of Engineers' implementation of delineation practices. The Board shall also adopt guidance and regulations for review and approval of the geographic area of a delineated wetland. Any such approval of a delineation shall remain effective for a period of five years; however, if the Board issues a permit pursuant to this subsection for an activity in the delineated wetland within the five-year period, the approval shall remain effective for the term of the permit. Any delineation accepted by the U.S. Army Corps of Engineers as sufficient for its exercise of jurisdiction pursuant to § 404 of the Clean Water Act shall be determinative of the geographic area of that delineated wetland."

The Virginia Water Protection Permit Program Regulation states in 9 VAC 25-210-45, Wetland Delineation: "Each delineation shall be conducted in accordance with the USACE "Wetland Delineation Manual, Technical Report Y-87-1, January 1987, Final Report" (Federal Manual). The Federal Manual shall be interpreted in a manner consistent with USACE guidance and the requirements of this regulation, and any delineation guidance adopted by the board as necessary to ensure consistency with the USACE implementation of delineation practices."

The Corps of Engineers issued guidance clarifying the definitions of waters of the United States under their Section 404 regulatory program (33 CFR Parts 320 through 330) as a Final Rule published in the Federal Register (Vol 51, No 219) on November 13, 1986. This final rule specifically addressed the issue of surface waters created during mining operations, as follows: "We generally do not consider the following to be 'Waters of the United States'.....Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purposes of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States..."

VWPP Program Implications

In accordance with our statutory and regulatory directive to adopt appropriate guidance and regulations to ensure consistency with the U.S. Army Corps of Engineers' implementation of delineation practices, this guidance is being issued to clarify how to consider surface water areas, including wetlands, that are formed incidentally out of uplands as part of a permitted construction or excavation activity for the purposes of obtaining fill, sand, or gravel. In order to remain consistent with the federal implementation of delineation practices, these areas would not be considered jurisdictional under the VWPP program as long as the permit for the construction or excavation is active. Once that permit expires, and the site is abandoned, then any areas that meet the definitions of surface waters regulated by the VWPP program would be subject to that program.